Jurisdictional Statement

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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BANCO DE CREDITO RURAL ARGENTINO S.A.

Appellant,

v.

BANQUE ARABE ET INTERNATIONALE D'INVESTISSEMENT,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

JURISDICTIONAL STATEMENT

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November 18, 1981

(11669)

QUESTIONS PRESENTED

(1) Were the rights of appellant (an Argentine corporation not doing business in New York) to due process violated when the New York Supreme Court purported to exercise in personam jurisdiction over appellant and quasi in rem jurisdiction over appellant's property on the basis of appellee's allegation that appellant had committed a tort in New York, or one which had had consequences in New York, by sending a telex from Buenos Aires to appellee's correspondent bank in New York demanding reimbursement for a payment made by appellant as the advising and paying bank under a letter of credit issued by appellee as the buyer of Argentine beef in favor of the Argentine seller of the beef, pursuant to which telex the New York bank,

for appellee's account, had transferred funds to an account maintained by appellant with a bank in New York, appellee having alleged in its complaint that the payment made to the seller by appellant was not proper under the terms of the letter of credit and that appellant, therefore, had had no right to reimbursement under the letter of credit?

(2) Is New York Civil Practice Law and Rules § 302(a)(3)(ii), 1962 N.Y. Laws Chapter 308 § 302(a)(3)(ii) invalid in toto, or at least as applied to the facts presented on the record in the action in the New York Supreme Court in which this appeal is taken?

(3) Is New York Civil Practice Law and Rules § 314(3), 1962 N.Y. Laws Chapter 308 § 314(3) invalid in toto, or at least as applied to the facts presented

on the record in the action in the New York Supreme Court in which this appeal is taken?

(4) Did the New York Supreme Court misapply the holdings in Shaffer v. Heitner, 433 U.S. 186 (1977) and Rush v. Savchuck, 444 U.S. 286 (1980) when it purported to exercise jurisdiction of appellant and its property on a theory combining elements of "tort long-arm" jurisdiction and quasi in rem jurisdiction?

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Appellant,

v.

BANQUE ARABE ET INTERNATIONALE
D'INVESTISSEMENT, Appellee.

ON APPEAL FROM THE APPELLATE DIVISION
OF THE SUPREME COURT OF THE
STATE OF NEW YORK, FIRST DEPARTMENT

JURISDICTIONAL STATEMENT

Appellant, Banco de Credito Rural Argentino S.A., appeals from an order of the Appellate Division of the Supreme Court of the State of New York, First Department ("the Appellate Division") dated and entered May 28, 1981 in

an action entitled Banque Arabe et Internationale D'Investissement v. Banco De Credito Rural Argentino S.A., New York County Clerk's Index No. 22203/1980, affirming an order of the Supreme Court of the State of New York, County of New York, dated January 22, 1981 and filed January 29, 1981. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction on direct appeal to review the Appellate Division's order and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of New York, not reported, the order entered with that opinion, the order of the Appellate Division affirming the Supreme Court's order and the order of the Appellate Division denying appellant's motion for leave to appeal

to the Court of Appeals of the State of New York are printed in the appendix hereto.

The Appellate Division rendered no opinion on its order affirming the Supreme Court's order, nor did the Appellate Division render an opinion on its order denying appellant's motion for leave to appeal to the Court of Appeals of the State of New York.

JURISDICTION

In the action below, the New York courts upheld an attachment of appellant's New York bank accounts over appellant's objection that the attachment of the property and the exercise of in personam and quasi in rem jurisdiction over defendant and its property violated appellant's right to due process.

The order of the Appellate Division from which the appeal is taken was dated and entered May 28, 1981. That order became final upon entry of the order of the Appellate Division denying appellant's motion for leave to appeal to the Court of Appeals of the State of New York, which was dated and entered August 20, 1981. The notice of appeal to the United States Supreme Court was filed November 18, 1981 in the office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, First Department, and in the office of the Clerk of New York County, who also acts as the Clerk of the Supreme Court of the State of New York, New York County.

The jurisdiction of the United States Supreme Court to hear this appeal rests on 28 U.S.C. §1257(2) and is sus-

tained by Shaffer v. Heitner, 433 U.S. 186, 195 n. 13 (1977) and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 485 (1975).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

(1) United States Constitution, amend. XIV, in United States Code Vol. 1 at XLVII

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law; ..."

(2) New York Civil Practice Law and Rules §302(a), 1962 N.Y. Laws Chapter 308 § 302(a)

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

* * *

(2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

(3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

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(3) New York Civil Practice Law and Rules §314(3), 1962 N.Y. Laws Chapter 308 § 314(3)

> Service [of a summons] may be made without the state by any person authorized by section 313 in the same manner as service is made within the state
>
> * * *
>
> 3. where a levy upon property of the person to be served has been made within the state pursuant to an order of attachment or a chattel of such person has been seized in an action to recover a chattel.

QUESTIONS PRESENTED

(1) Were the rights of appellant (an Argentine corporation not doing business in New York) to due process violated when the New York Supreme Court purported to exercise in personam jurisdiction over appellant and quasi in rem jurisdiction over appellant's property on the basis of appellee's allegation that appellant had committed a tort in New York, or one which had had conse-

quences in New York, by sending a telex from Buenos Aires to appellee's correspondent bank in New York demanding reimbursement for a payment made by appellant as the advising and paying bank under a letter of credit issued by appellee as the buyer of Argentine beef in favor of the Argentine seller of the beef, pursuant to which telex the New York bank, for appellee's account, had transferred funds to an account maintained by appellant with a bank in New York, appellee having alleged in its complaint that the payment made to the seller by appellant was not proper under the terms of the letter of credit and that appellant, therefore, had had no right to reimbursement under the letter of credit?

(2) Is New York Civil Practice Law and Rules § 302(a)(3)(ii), 1962 N.Y.

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(4) Did the New York Supreme Court misapply the holdings in Shaffer v. Heitner, 433 U.S. 186 (1977) and Rush v. Savchuck, 444 U.S. 286 (1980) when it purported to exercise jurisdiction of appellant and its property on a theory combining elements of "tort long-arm" jurisdiction and quasi in rem jurisdiction?

STATEMENT OF THE CASE

THE PARTIES

The appellant, Banco de Credito Rural Argentino S.A., is a banking corporation organized and existing under the laws of the Republic of Argentina. Appellee, Banque Arabe et Internationale D'Investissment, is a banking corporation organized and existing under the laws of the Republic of France. There has been no change in parties since the institution of the action.

THE FACTS

The action arises from alleged breaches of international commercial agreements, none of which in any way involved the United States, let alone the State of New York, or any citizen thereof. The following statement of the facts assumes the correctness of the findings

of the justice of the New York Supreme Court in the opinion rendered by him in support of his decision upholding the attachment and refusing to dismiss the complaint.

Appellee issued letters of credit in France for one of its French customers in favor of an Argentine businessman to cover the purchase price of Argentine beef sold by the latter to appellee's French customer for shipment directly from Argentina to France. (App. 2) The letters of credit named appellant as the advising bank. (App. 2) Under the terms of the letters of credit appellant, upon presentation of documents prior to loading of the beef, was to pay the seller a percentage of the purchase price and instruct Morgan Guaranty Trust Company in New York ("Morgan") to debit

appellee's account and remit to appellant. It was appellee who had designated Morgan as the reimbursing bank and New York as the place of reimbursement. Upon loading of the beef, appellant was to pay the balance and receive reimbursement in the same manner. All actions taken by appellant pursuant to the letters were taken in Argentina. Thus, after paying the seller there, appellant sent telexes from Argentina to Morgan in New York requesting reimbursement. Morgan debited appellee's account and transferred funds to accounts maintained by appellant with banks in New York.

Appellee contends that appellant violated the terms of the letters of credit by accepting inadequate commercial documents, with the result that payment was made to the seller although the

beef was neither stored for nor shipped to appellee. (App. 2) Therefore, appellee asserts, appellant should not have paid the seller and had no right to draw on Morgan. (App. 3) Although the controversy obviously is one sounding in contract, appellee, in an effort to improve its position under New York attachment law, alleged in its complaint that appellant had engaged in tortious conduct in New York by "wrongfully" accepting the funds transferred to its account in New York by Morgan. (App. 7).

PROCEEDINGS IN THE NEW YORK COURTS

At the time of instituting the instant action in the Supreme Court of New York, New York County, appellee obtained an order of attachment against the bank accounts maintained by appellant

in New York. In support of its application for the order, appellee argued that attachment was essential for appellee to acquire jurisdiction inasmuch as there was "a question whether in personam jurisdiction can be acquired over" appellant.*

When appellee moved to confirm the attachment, appellant moved for an order dismissing the complaint for lack of jurisdiction and on the additional ground of forum non conveniens and for damages. The New York Supreme Court granted appellee's motion and denied appellant's. (App. 6-7).

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* Affidavit of Serge Rateau, sworn to October 21, 1980, submitted in support of appellee's application for the order of attachment, para. 4(d). The papers submitted to the Supreme Court, which are lengthy, have not been included in the appendix.

The New York Supreme Court found that the letters of credit were in French and the commercial documents in Spanish; appellant had no office in New York; it had not been established whether appellant did business in New York; and appellee maintained no office in New York and was not licensed to transact business there. (App. 3) The court further found that the sole relationship of the transaction to New York was that reimbursement in U.S. Dollars was demanded in New York (by a telex sent by appellant in Buenos Aires to Morgan in New York) and made to appellant (through transfer by Morgan of funds to appellant's bank accounts) in New York. (App. 4)*

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* While in its brief description of the transaction the court did not avert to the manner in which appellant made its demand for payment, it is undisputed that its demand was made by telex from appellant's office in Buenos Aires.

The court showed its understanding of the state of the law relating to jurisdiction over foreign corporations by observing that the (telex) demand and payment in New York were "not unimportant" and that furthermore

> "...jurisdiction over the assets of defendant can give New York jurisdiction over this litigation." (App. 4).

Acting on these premises, the court refused to vacate the attachment, holding that

> "[b]oth the acts of defendant, and the attachment of the res are adequate as bases for jurisdiction particularly when the dollars lost to appellee in this jurisdiction were credited to defendants [sic] New York accounts which were attached here." (App. 6).

Distinguishing Shaffer v. Heitner, 433 U.S. 186 (1977) and Rush v. Savchuck, 444 U.S. 286 (1980), the court elaborated on its holding:

> "...in Schaffer [sic; read Savchuck], the insurance policy was neither the subject matter of the case nor was it related to the operative facts of the negligence action. Here the dollars in New York, alleged to have been taken wrongfully by appellant not only results [sic] in a tort committed in New York, but also, since the dollars went into the accounts later attached, given [sic] in rem jurisdiction." (App. 6-7).

The Appellate Division affirmed the Supreme Court's decision without rendering an opinion (App. 14-15) and denied appellant's motion for leave to appeal to the Court of Appeals of New York (App. 16-17).

HOW THE FEDERAL QUESTION WAS PRESENTED

As noted above, appellant argued in the New York Supreme Court that no in personam or quasi in rem jurisdiction had been established and, alternatively, that New York was forum

non conveniens (App. 7-8). The Special Term judge considered and ruled adversely on all of appellant's arguments. (App. 6-8).

On its appeal to the Appellate Division, appellant repeated the three arguments which it had urged at Special Term. The Appellate Division rendered no opinion in support of its order affirming Special Term's order; however, its affirmance shows that it had rejected not only appellant's argument based on forum non conveniens but also appellant's challenge to the constitutionality of Special Term's action. If the Appellate Division had agreed with either of appellant's arguments, it would have reversed Special Term's order. Thus, the constitutional issues presented on this appeal were decided adversely to appellant by

the highest court of the State of New York to which appellant was permitted to present its case.

THE QUESTIONS ARE SUBSTANTIAL

INTRODUCTION

New York has asserted jurisdiction over appellant and is threatening to subject appellant to prolonged immobilization of its funds, extended and costly litigation and possibly eventual confiscation of its funds located in New York on grounds that defy principles of due process clearly enunciated by this Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945), Shaffer v. Heitner, 433 U.S. 186 (1977), World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286 (1980) and Rush v. Savchuck, 444 U.S. 320 (1980).

The importance of the New York state court's action transcends the interests of the parties involved in the action. The court based its assertion of in personam jurisdiction over appellant on a statute which, at least as here applied, conflicts with World-Wide Volkswagen and rested its assertion of quasi-in-rem jurisdiction over appellant's funds on a New York statute that after Shaffer is void on its face but is nonetheless still enforced day in and day out by the New York Supreme Court for New York County, the busiest and most influential commercial court in the country, five years after this Court's decision in Shaffer. Thus, in the instant action, jurisdictional attachment was granted, ex parte, by one Special Term justice and subsequently validated

by another on the assumption that "jurisdiction over the assets of defendant can give New York jurisdiction over this litigation". (App. 4). The Appellate Division having upheld the latter decision and denied appellant leave to appeal to the Court of Appeals of the State of New York, appellant's only recourse is this appeal.

DISCUSSION

The New York Supreme Court held that there were two possible bases for exercise of jurisdiction: (1) "tort long-arm" jurisdiction based on the commission by appellant in New York of the "tort" of drawing, by telex sent from Buenos Aires, on appellee's New York correspondent in alleged violation of appel-

lant's contract with appellee* and (2) the attachment of appellant's New York bank accounts. The court sought to buttress this holding by pointing to the "fact" that "the dollars lost to plaintiff in [New York] were credited to defendant's New York accounts which were attached [in New York]". The court evidently thought that if the two separate, postulated jurisdictional bases were

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* The court should not have reached the issue of the applicability of the "tort long-arm" statute. Drawing on funds in alleged violation of contract is not a tort. One cannot obtain jurisdiction in an action for breach of contract by labeling the breach a tort. Stanat Manufacturing Co. v. Imperial Metal Furnishing Co., 325 F.Supp. 794 (E.D.N.Y. 1971); Stella Flour & Feed Corp. v. National City Bank, 285 App. Div. 182, 136 N.Y.S.2d 139 (1st Dep't 1954), aff'd 308 N.Y. 1023 (1955); and Wegman v. Dairylea Coop., Inc., 50 App. Div. 2d 108, 376 N.Y.S.2d 728 (4th Dep't 1975), appeal dismissed 38 N.Y.2d 918, 382 N.Y.S. 2d 979 (1976). The court's willingness to accept appellee's tenuous legal theory in order to find jurisdiction adds insult to the injury done to appellant's right to due process.

defective, combining them would cure the defect.

Appellant respectfully submits that (1) the New York court's holding based on "long-arm" jurisdiction should be reviewed by this Court for its apparent conflict with World-Wide Volkswagen Corporation v. Woodson, supra; (2) the court's holding based on quasi-in-rem jurisdiction is so defective as to require summary reversal; and (3) the court's holding based on a combination of the two types of jurisdiction should be reviewed because it evinces a dangerous misunderstanding on the part of the New York Supreme Court of this Court's holding in Shaffer, supra.

POINT I

AN UNCONSTITUTIONAL APPLICATION OF THE NEW YORK "TORT LONG-ARM" JURISDICTION STATUTE HAS BEEN MADE IN THE ACTION BELOW

1962 N.Y. Laws Chapter 308 ("New York Civil Practice Law and Rules") §302(a) purports to authorize the courts of the State of New York to exercise "long-arm" jurisdiction in two categories of tort cases: (1) where defendant has committed a tortious act within the State of New York (§302(a)(2)) and (2) where the defendant has committed a tortious act outside New York causing injury to person or property in New York (§302(a)(3)). Jurisdiction in the latter category of cases may be exercised only if defendant regularly does or solicits business in New York, engages in any other persistent course of conduct or derives

substantial revenue from goods used or consumed or services rendered in New York (§302(a)(3)(i)) or, if none of the foregoing is true, expects or should reasonably expect his act to have injurious consequences in New York and derives substantial revenue from interstate or international commerce (§302(a)(3)(ii)).

Jurisdiction Based on Torts Committed in New York

The New York Supreme Court did not specify which subsection of the New York "long-arm" statute it meant to apply. Its statement that "[t]he dollars in New York, alleged to have been taken wrongfully by petitioner ... results [sic] in a tort committed in New York ..." (App. 7) may be taken to indicate that the court meant to apply § 302(a)(2), which confers jurisdiction over tortious

acts committed within the state as opposed to § 302(a)(3), which confers jurisdiction where tortious acts committed outside the state caused injury within the state. It is doubtful, however, that such was the court's intention, for such a holding would be directly contrary to a line of decisions by the New York Court of Appeals which was cited and discussed in the briefs of the parties submitted to the New York Supreme Court. Thus, the New York Court of Appeals held in Kramer v. Vogl, 17 N.Y.2d 27 (1966), that the sending of a false communication from abroad to New York with the result that injury is caused in New York is not a tort "committed in" New York. See also Singer v. Walker, 15 N.Y.2d 443 (1965), and Lehigh Valley Industries v. Bisenbaum, 389 F.Supp. 798

(S.D.N.Y. 1975); aff'd 527 F.2d 87 (2d Cir. 1975). Appellant, in any realistic view of the fact, committed no tortious act within New York. Whatever tortious conduct has been alleged occurred in Argentina. Appellant received the warehouse documents in Argentina, evaluated the presentment in Argentina and paid the seller in Argentina. The actions appellant took to obtain reimbursement occurred in Argentina where appellant composed its telex messages to Morgan, activated its telex terminal and transmitted its telexes. The Court of Appeals of New York has held that subsection 302(a)(2) does not authorize jurisdiction of an action for a tort committed outside New York even when it is alleged that the tort had an effect within the state, Feathers v. McLucas, 15 N.Y.2d 443 (1965).

For all of these reasons, it is likely that the New York Supreme Court meant to invoke the provisions of § 302(a)(3), which applies when the injurious consequences of the tort, not the tort itself, occur in New York.* In any event, regardless of which subsection the court had in mind, in view of the facts presented on the record, the only statutory authority available to the court for asserting in personam jurisdiction was § 302(a)(3), discussed below.

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* If the court uncritically accepted appellee's conclusory allegations of tortious acts "committed in New York", the court violated its obligation to look beyond the pleadings to establish the jurisdictional facts. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936). Where the defendant never entered the forum state and did all of the acts of which the plaintiff complains outside the state, careful scrutiny of the connection, if any, between those acts and the forum state is called for. See Taylor v. Portland Paramount Corporation, 383 F.2d 634, 641 (9th Cir. 1969).

Torts Committed Outside New York Having Injurious Consequences in New York

Subsection (a)(3)(i) is ruled out as a jurisdictional basis for this case by the court's express refusal to find that defendant conducted business in New York. The court's finding, then, rested on subsection (a)(3)(ii), which permits exercise of in personam jurisdiction over a foreign defendant who commits a tortious act outside New York causing injury to property within New York although the defendant neither engages in business or other persistent conduct in New York nor derives substantial revenue from New York, provided that he should reasonably expect the tortious act to have injurious consequences in New York. Because the gravamen of appel-

lee's complaint involves transactions between Argentine and French entities and the delivery of merchandise to Europe, appellant could never reasonably have anticipated that it would be brought into a New York court to defend a claim in New York based upon its acts in Argentina. In fact, as noted above, it was appellee who chose Morgan as the agent and New York as the place for reimbursement of appellant -- the only point of contact between the transaction in suit and the state of New York. For these reasons, it is incompatible with due process to purport to exercise CPLR 302(a)(3)(ii) jurisdiction over appellant in the case at bar. See American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428, 435 (2d Cir. 1971); cf. Spectacular Promotions, Inc. v. Radio

Station WING, 272 F.Supp. 734, 737 (E.D.N.Y. 1967).

Even if it had been foreseeable that consequences of the type of which appellee complains would occur in New York, jurisdiction could not have been asserted in this action consistent with the requirements of due process. See World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).

In World-Wide Volkswagen, this Court held that "'foreseeability' alone has never been a sufficient bench mark for personal jurisdiction under the Due Process clause." 444 U.S. at 295. Foreseeability is relevant, this Court said, only when defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. 444 U.S. at 297.

This Court held that such conduct and connection would be present if defendant delivered its products into the stream of commerce with the expectation that they would be purchased by consumers in the forum state. 444 U.S. at 297-98. In the instant case, not only has appellant not delivered products or services into the State of New York, but appellant has engaged in no conduct and has had no connection with the forum state of such a character that it should reasonably have anticipated being made a defendant in an action there. See the discussion supra p. 27. The New York Court of Appeals has acknowledged that the New York statute is even "more broadly worded" than the statute found to be unconstitutional in World-Wide v. Volkswagen, supra. (See, Fantis Foods, Inc.

v. Standard Importing, 49 N.Y.2d 317 (1980)), which is the same as saying that, if the statute is applied as written, an infringement of due process rights may result. Appellant respectfully submits that this is precisely what happened in the action below. Review by this Court, then, is required of the New York court's application of New York Civil Practice Law and Rules § 302(a)(3)(ii) to the facts of the instant case.

POINT II

NEW YORK'S JURISDICTIONAL ATTACHMENT STATUTE IS UNCONSTITUTIONAL

The New York Supreme Court's bald statement to the contrary notwithstanding, attachment of appellant's property in the forum state did not confer jurisdiction, whether in personam or quasi in rem. See Shaffer v. Heitner, supra.

The court's holding that attachment jurisdiction was properly asserted necessarily rested on New York Civil Practice Law and Rules §314(3), which permits service outside the State of New York of a summons instituting an action in the New York Supreme Court where a levy upon property of the intended defendant has been made within New York pursuant to an order of attachment. In view of Shaffer, this statute cannot stand. It was with respect to precisely this type of exercise of jurisdictional power that this Court said in Shaffer:

> Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant. 433 U.S. 212

This Court should review the obvious conflict between New York Civil

Practice Law and Rules §314(3) and the principles enunciated by this Court in Shaffer.

POINT III

THE SUM OF THE TWO DEFECTIVE JURISDICTIONAL BASES IS A DEFECTIVE JURISDICTIONAL BASIS

While both the New York court's holding that appellant's acts in Argentina conferred "tort long-arm" jurisdiction and its holding that quasi-in-rem jurisdiction is alive and well require review and correction by this Court, the New York court's further assumption that, in any event, the two grounds combined confer valid jurisdiction furnishes a particularly urgent ground for review, for it was based on a dangerous misconception of this Court's holding in Shaffer v. Heitner, supra.

Appellant believes that Shaffer stands for the proposition that jurisdiction in an action other than an in rem action can no longer be predicated on the presence of defendant's assets in the forum state but must in all cases be judged by traditional notions of justice and the criteria of fair play. Put differently, an exercise of jurisdiction based on the presence of defendant's debtor in the forum state does not meet the requirements of justice and fairness. To hold, as did the New York Court in the instant case, that the presence of the debt furnishes an adequate basis for jurisdiction because the debt had at one time been augmented by a "tort" committed by appellant against the appellee is to reintroduce the remedy of quasi-in-rem jurisdictional attachment which this

Court outlawed in Shaffer. It can make no difference that the property attached is in the form of a debt owed by a bank in the forum state to the appellant and that the alleged tort resulted in a transfer of funds to the debtor bank. Whatever jurisdictional implications might have been engendered if appellee had attached the instrument of transfer, it is clear that the attached "funds" of appellant (i.e. the New York correspondent bank's debt to appellant) were merely part of appellant's general assets. There clearly is no more connection between the "dollars lost to [appellee]" and the correspondent bank's debt to appellant at the time of the attachment than there is between those "dollars" and any of appellant's other assets. If the New York court's holding is allowed

to stand, an argument for jurisdictional attachment can be made in any case in which defendant's net worth has been enhanced in some manner by his alleged tort or breach of contract. In each such case the argument could then be made that it is fair that a proportionate amount of defendant's net worth should, at the outset of the suit, be appropriated for eventual application to his obligation to plaintiff. This, appellant respectfully submits, is but a variant of the justification given since ancient times for jurisdictional attachment of a defendant's assets in the forum state -- the remedy abolished in Shaffer.

CONCLUSION

For the foregoing reasons, the Court should conclude that the Court has jurisdiction and that substantial ques-

tions are presented requiring plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

WILLIAM E. KELLY

PREBEN JENSEN

CASEY, LANE & MITTENDORF
26 Broadway
New York, New York 10004
(212) 943-3000

Counsel for Appellant

Of Counsel:

MANUEL H. QUINTANA

November 18, 1981

APPENDIX

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM PART I

----------X

BANQUE ARABE ET INTERNATIONALE
D'INVESTISSEMENT,

Plaintiff,

- against -

BANCO DE CREDITO RURAL ARGENTINO S.A.,

Defendant.

----------X

Index #22203/80

JAN 5 1981

MEMO MINUTE BOOK SPECIAL TERM PART I N.Y. LAW JOURNAL

MARTIN EVANS, J.:

Plaintiff moves for an order confirming an attachment, and defendant cross-moves for an order either dismissing the complaint for lack of personal jurisdiction, or on the ground of forum non conveniens, and seeks a vacatur of the

attachment and damages.

Plaintiff, a French bank, issued letters of credit on behalf of a Ets Biset et Cie in favor of M. Bernardo Pessetto, an Argentine beef seller, payable against certain documents. Defendant was the advising and paying bank. Payment was to be made in U.S. Dollars, and to achieve this result, plaintiff arranged for payment to defendant, in New York, through Morgan Guaranty Trust Co., upon receipt by defendant of proper documents and notice to Morgan, from defendant, to pay.

Under three letters of credit, (out of many others) a total of $890,328.53 was paid by Morgan to defendant under this arrangement. Plaintiff claims that the documents received by defendant to authorize this payment were inadequate, that the beef was not stored for or shipped to its customer, and that defen-

dant erred in paying under the letters of credit and had no right to draw on plaintiff's agent, Morgan, for payment.

The letters of credit are in French and the documents received by defendant are in Spanish. Whether or not there was conformity with the requirement of the letter of credit is said to require witnesses, all of whom are in Argentina, which is the residence of defendant.

Defendant has no office here, and whether or not it does business here, cannot be determined from the papers. It maintains bank accounts here and performs some transactions for its customers. Plaintiff has no office here, nor is it licensed to do business here.

The sole relationship of New York to this transaction, albeit not an unimportant one, is that payment in U.S. Dollars was demanded here, made here, and paid here to the defendant in New York, and

jurisdiction over the assets of defendant can give New York jurisdiction over this litigation.

Plaintiff claims that it is reluctant to bring this action in Argentina for several reasons: it claims that foreigners are not well treated by Argentinian Courts, and that commercial cases are subject to much delay. It has submitted no evidence to establish either of these allegations, and defendant has submitted an affidavit of an experienced Argentinian lawyer to the contrary.

There is a presumption that the Courts of civilized nations which adhere to established principles of international law, will treat all persons who come before them equally, regardless that some may be foreigners.

Occasionally, and sadly, this presumption is not always true, but unless the presumption is shown to be non-exis-

tent the Court will act upon it.

Plaintiff also claims that it will have to post a bond, in Argentina, for the payment of costs, including defendant's attorneys fees, in the event that it is unsuccessful; an expense it does not have to bear here.

This is not an unusual requirement, and exists in many ntations. Plaintiff, a banking corporation in France, which, like Argentina, is a civil-law nation, undoubtedly is familiar with that procedure, and it should cause no unexpected hardship.

The more significant claims of the plaintiff is that payment of any judgment in the Argentine will, except in unusual circumstances, be required to be made in pesos in the Argentine; that this would result in damages to it because, in effect, it would have been forced to exchange the U.S. Dollars, taken from its

account in Morgan, for pesos of uncertain value and which it might not be able to exchange for dollars at the time it receives them. It also shows, that in the event defendant itself becomes bankrupt, plaintiff will not fare as well under Argentine bankruptcy laws and other creditors.

There has been no adequate showing by defendant that plaintiff is in error in those claims.

The motion by defendant to dismiss the complaint for lack of jurisdiction is denied. Both the acts of defendant, and the attachment of the *res* are adequate as bases for jurisdiction particularly when the dollars lost to plaintiff in this jurisdiction were credited to defendants New York accounts which were attached here. *Schaffer* v. *Heitner and Rush* v. *Savchuck* relied upon different fact. In Schaffer, the insurance policy

was neither the subject matter of the case nor was it related to the operative facts of the negligence action. Here, the dollars in New York, alleged to have been taken wrongfully by defendant, not only results in a tort committed in New York, but also, since the dollars went into the accounts later attached, given in rem jurisdiction. Defendant may, however, allege lack of jurisdiction as a defense, in its answer so that the questions of fact may be more fully explored at trial.

The motion to vacate the attachment is denied. Plaintiff has shown a probability of success on the merits.

The motion to dismiss on the ground of forum non-conveniens is also denied. Essentially, the dispute is over the meaning of the terms of the letters of credit, which is in French, and the meaning of the documents which were ten-

dered. These were in Spanish. If the documents conformed to the letters of credit requirements, there is no cause of action. If they did not, a cause of action exists. This is a question of proper translation. In Argentina, there will have to be a translation from French to Spanish, while in New York, there will be a translation from French to English and from Spanish to English. This is a common situation and presents no difficulty to our Courts.

Settle order.

Dated:

1/2/81

/s/ E
Martin Evans, J.S.C.

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof located at 60 Centre Street, New York, New York on the 22 day of January 1981.

PRESENT:

THE HONORABLE MARTIN B. EVANS,
Justice of the Supreme Court

----------x

BANQUE ARABE ET INTERNATIONALE D'INVESTISSEMENT,

Plaintiff,

-against-

BANCO DE CREDITO RURAL ARGENTINO, S.A.,

Defendant.

----------x

JAN 28 1981

MINUTE BOOK SPECIAL TERM PART I N.Y. LAW JOURNAL

ORDER

Index No. 22203/1980

Plaintiff having moved by Order to Show Cause dated November 18, 1980, for an order confirming the Order of

Attachment granted ex parte on November 14, 1980, and Defendant having moved by Notice of Cross Motion dated December 17, 1980, for an order dismissing the complaint and vacating the Order of Attachment,

NOW, on reading and filing the Order of Attachment signed by The Honorable Sidney H. Asch on November 14, 1980, the Undertaking of the National Surety Corporation dated November 13, 1980, the Affidavit of Serge Rateau, sworn to on October 21, 1980, and the exhibits annexed thereto, the Affidavit of Leon G. R. Spoliansky, sworn to on October 27, 1980, and the exhibits annexed thereto, the Order to Show Cause signed by The Honorable Irving Kirschenbaum on November 18, 1980, the Affirmation of Donald Stuart Bab dated November 18, 1980, and the exhibits annexed thereto, the Summons and Complaint, the Affidavit of Pierre-

Antoine de Chambrun, sworn to on December 20, 1980, and the exhibits annexed thereto, the Affirmation of Donald Stuart Bab dated December 22, 1980, and the exhibits annexed thereto, and the proofs of service in respect of the foregoing, all in support of said motion by Plaintiff; the Notice of Cross Motion dated December 17, 1980, the Affidavit of John T. Morin, sworn to on December 17, 1980, the Affidavit of Luis B. Nofal, sworn to on December 10, 1980, and the exhibits annexed thereto, the Affidavit of Dr. Manuel Gonzalez Lentini, sworn to on December 10, 1980, the Affidavit of Osvaldo H. Tagliabue, sworn to on December 10, 1980, and the exhibit annexed thereto, the Affidavit of Ronaldo E. Dordoni, sworn to on December 10, 1980, and the exhibits annexed thereto, and the Affidavit of Juan E. Gondra, sworn to on December 10, 1980, all in

opposition to said motion and in support of said cross motion; and due deliberation having been had thereon, and the Court, having rendered a decision dated January 8, 1981, it is

ORDERED, that the motion to confirm the Order of Attachment be, and the same hereby is, granted; and it is further

ORDERED, that the cross motion for an order dismissing the complaint for lack of jurisdiction be, and the same hereby is, denied without prejudice to defendant to assert lack of jurisdiction in its answer; and it is further

ORDERED, that the cross motion for an order dismissing the complaint on the ground of forum non conveniens be, and the same hereby is, denied, and it is further

ORDERED, that the cross motion for an order vacating the Order of

Attachment and for an award of damages be, and the same hereby is, denied.

ENTER:

/s/ E
Justice of the Supreme Court

F I L E D

JAN 29 1981

CO. CLERK'S OFFICE
NEW YORK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 28, 1981.

Present—Hon. David Ross, Justice Presiding,
Arthur Markewich,
Max Bloom,
Arnold L. Fein,
J. Robert Lynch, Justices.

Banque Arabe et Internationale D'Investissement,

Plaintiff-Respondent,

-against-

Banco De Credito Rural Argentino S.A.,

Defendant-Appellant.

10970

An appeal having been taken to this Court by the defendant-appellant from order of the Supreme Court, New York County (M. Evans, J.), entered on January 29, 1981, which, inter alia, granted plaintiff's motion to confirm an order of attachment, and said appeal having been argued by Mr. William E.

Kelly, of counsel for the appellant, and by Mr. Donald Stuart Bab, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondent shall recover of appellant $75 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI

Clerk.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on August 20, 1981

Present--Hon. David Ross, Justice Presiding
Arthur Markewich
Max Bloom
Arnold L. Fein
J. Robert Lynch, Justices

Banque Arabe et Internationale D'Investissement,

Plaintiff-Respondent,

-against-

Banco de Credito Rural Argentino, S.A.,

Defendant-Appellant.

M-2660

The above-named defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on May 28, 1981 [Appeal No. 10970],

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in

support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER:

JOSEPH J. LUCCHI

Clerk.

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, New York, New York on the 14th day of November, 1980.

P R E S E N T :

Honorable Sidney H. Asch

Justice

- -x
:
BANQUE ARABE ET INTERNATIONALE D'INVESTISSEMENT, :

Plaintiff, :

-against- :

BANCO DE CREDITO RURAL ARGENTINO S.A., :

Defendant. :

- -x

ORDER OF ATTACHMENT

Index No. 22203/1980

A motion having been made herein by the Plaintiff for an Order of Attachment against the property of the Defendant,

Now, on reading a copy of the

proposed verified complaint herein, the affidavits of Serge Rateau, sworn to on the 21st day of October, 1980, and Leon G. R. Spoliansky, sworn to on the 27th day of October, 1980, wherein it appears that a cause of action for a money judgment exists in favor of the Plaintiff and against the Defendant, for the sum stated in the affidavits, namely $890,328.53 (with interest from the 13th day of December, 1979), and that the Plaintiff is entitled to recover that sum exceeding all counterclaims known to it;

And it being further shown by the affidavits and complaint that the Plaintiff is entitled to an Order of Attachment against the property of the Defendant on the ground that the Defendant is a foreign corporation not qualified to do business in the State of New York (CPLR 6201, subsection 1), and

the undertaking required by law having been submitted herewith;

Now, on motion of Putney, Twombly, Hall & Hirson, attorneys for the Plaintiff, it is

ORDERED, that the Plaintiff's undertaking be and the same hereby is fixed in the sum of $115,000.00, of which amount the sum of $65,000.00 thereof is conditioned that the Plaintiff will pay to the Defendant all costs and damages including reasonable attorney's fees which may be sustained by reason of the attachment if the Defendant recovers judgment, or it is finally decided that the Plaintiff was not entitled to an attachment of the Defendant's property, and the balance thereof conditioned that the Plaintiff will pay to the sheriff all of his allowable fees, and it is further

ORDERED, that the Sheriff of

the City of New York, or the Sheriff of any county of the State of New York, levy within his jurisdiction, at any time before final judgment, upon such property in which the Defendant has an interest and upon such debts owing to the Defendant as will satisfy the amount of $1,141,000.00, which represents the Plaintiff's demand together with probable interest, costs and the Sheriff's fees and expenses, and that he proceed hereon in the manner required by law, and it is further

ORDERED, that within five days after levy is made, Plaintiff shall make a motion on such notice as the court shall direct to the defendant, sheriff and garnisher if any for an order confirming the grounds upon which this Order of Attachment was granted. If no such motion is made, this order shall have no further effect and shall be vacated on

motion.

Within 10 days.

ENTER

S/SHA

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

- -x

BANCO DE CREDITO RURAL ARGENTINO S.A., :

Appellant, :

v. :

BANQUE ARABE ET INTERNATIONALE D'INVESTISSEMENT, :

Appellee. :

- -x

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

Index No. 22203/1980

PLEASE TAKE NOTICE that Banco de Credito Rural Argentino S.A., the appellant above named, hereby appeals to the Supreme Court of the United States from the order of the Appellate Division of the Supreme Court of the State of New York, First Department, in this action dated and entered May 28, 1981, affirming the order of the Supreme Court

of the State of New York, County of New York, in this action dated January 22, 1981 and entered in the Office of the Clerk of New York County on January 29, 1981. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: New York, New York
November 17, 1981

WILLIAM E. KELLY

PREBEN JENSEN

CASEY, LANE & MITTENDORF
26 Broadway
New York, New York 10004
(212) 943-3000

Counsel for Appellant
Banco de Credito Rural
Argentino S.A.

TO: PUTNEY, TWOMBLY, HALL & HIRSON
Attorneys for Appellee
Banque Arabe et Internationale
D'Investissement
250 Park Avenue
New York, New York 10177

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

BANCO DE CREDITO RURAL ARGENTINO S.A.,

Appellant,

v.

BANQUE ARABE ET INTERNATIONALE D'INVESTISSEMENT,

Appellee.

AFFIDAVIT OF SERVICE

Index No. 22203/1980

ROBERTO BALAGUER, JR., being duly sworn, deposes and says that he is employed by Casey, Lane & Mittendorf, attorneys for the appellant herein, he is over the age of eighteen years and is not a party to the within action.

On the 17th day of November, 1981, he served a true copy of the within Notice of Appeal to the Supreme Court of the United States on appellee's attorneys

by delivering to and leaving same at the offices of Putney, Twombly, Hall & Hirson, 250 Park Avenue, New York, New York, this being the adress designated by said attorneys for that purpose upon the preceding papers in this action.

/s/ ROBERTO BALAGUER,JR.
ROBERTO BALAGUER, JR.

Sworn to before me this
17th day of November, 1981.

/s/ ROBERTA O. PEDERSEN
Notary Public

ROBERTA O. PEDERSEN
Notary Public, State of New York
No. 31-4724357
Qualified in New York County
Commission Expires March 30, 1982

END OF DOCKET